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Supreme Court of the United States.

OCTOBER TERM, 1965

No. [redacted] 186

DAVID H. PRICE, ROSALIE PRICE, AND HENRY S. PRICE,
Petitioners,

v.

ESTHER PRICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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PERIODICAL CITED.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

DAVID H. PRICE, ROSALIE PRICE, AND HENRY S. PRICE,
Petitioners,

v.

ESTHER PRICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the Superior Court of the Commonwealth of Massachusetts entered in accordance with the rescript of the Supreme Judicial Court of Massachusetts dated March 4, 1965, in the case there entitled *David H. Price & Another* v. *Esther Price & others.*

Opinion Below.

An opinion was filed by the Supreme Judicial Court of Massachusetts on March 4, 1965. It is reported in 1965

Massachusetts Advance Sheets 431, 204 N.E. 2d 902. It is printed in the Appendix, p. 11.

Jurisdiction.

The rescript of the Supreme Judicial Court of Massachusetts is dated March 4, 1965. It affirmed a decree (R. 37) of the Superior Court.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

The writ is sought to be directed to the Superior Court, and not to the Supreme Judicial Court, because, under the Massachusetts statutes[2] and practice, only questions of law are brought before the Supreme Judicial Court, the record and decree remaining in the Superior Court. In this case, in accordance with its usual practice, the Supreme Judicial Court did not remove the record from the Superior Court. *McDonald* v. *Massachusetts,* 180 U.S. 311 (opinion by Justice Horace Gray). *Rothschild* v. *Knight,* 184 U.S. 334. See also *Hodges* v. *Snyder,* 261 U.S. 600, 601.

Question Presented.

When a state trial court enters a final decree from which an appeal is taken, and the case law of the jurisdiction is

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[1] The Superior Court, on March 15, 1965, entered a decree after rescript (App. 17). This is the decree of which review is sought. An application for rehearing (dated March 16, 1965) was presented to the Chief Justice of the Supreme Judicial Court (App. 20). It was denied on April 1, 1965 (App. 26). Time for filing this petition, however, will be taken to run from the date of the rescript. *Cole* v. *Violette,* 319 U.S. 581.

[2] Mass. General Laws (Ter. Ed.) c. 211, § 8; c. 231, § 135.

clearly established that the trial court has no jurisdiction to proceed further in the case, but the trial court entertains a motion to vacate its decree and undertakes further proceedings looking to a substitute decree, and the party who took the appeal, relying upon the established law, declines to take part in the further proceedings, and the trial court vacates its decree and enters a substitute decree, does the decision of the state's highest court, sustaining the jurisdiction of the trial court to proceed further after entering its first decree, and affirming the substitute decree (thus actually, though not expressly, overruling retroactively the established law as to trial court jurisdiction) deprive the party of his right to hearing in the case without due process of law?

Constitutional Provision Involved.

The Constitutional provision involved is the following clause of section 1 of Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case.

Two of the petitioners, David H. and Rosalie Price, children of one Louis N. Price, deceased, and legatees and devisees under his will, brought a suit (R. 1) against the respondent, Esther Price, the widow of Louis. The suit was to restrain prosecution of an action at law by the widow against the executor and trustee under the will of Louis for enforcement of an alleged will compromise agreement, to obtain an accounting of funds paid to the widow by the executor, and to obtain a declaratory judgment of the validity of an antenuptial agreement between Louis and

Esther (R. 5) by which each renounced rights in the property of the other. Petitioner Henry Price, the executor and trustee, was made a party defendant, as was Pearl Clayman, another child of the decedent, and a beneficiary under his will. Pearl Clayman did not appeal, and is not a petitioner.

After the defendant Esther Price's demurrer to the bill of complaint was overruled (*Price* v. *Price,* 341 Mass. 390), she filed a substitute answer (R. 18) which, the trial judge ruled (R. 41), contained a counterclaim setting forth the alleged will compromise agreement and seeking enforcement thereof.

The case was heard in part on September 27 and 28, 1962, and on the latter date it was continued to some future day (R. 48, 49). A further hearing was held on December 13, 1962 (R. 49), and on December 19, 1962, a final decree was entered against Henry S. Price, as he is executor and trustee under his father's will, ordering him to pay Esther Price a sum of money (R. 31). The plaintiffs (R. 32) and Henry S. Price, as he is executor and trustee (R. 33), appealed from this decree.

Henry S. Price had not been given notice of the December 13, 1962, hearing (R. 37) and the trial judge entertained his motion (R. 35) to vacate the decree, and later, on March 25, 1963, allowed the motion (R. 37). Meanwhile, on January 16, 1963, further testimony was taken in the case. Mr. Crane, counsel for the plaintiffs, "steadfastly declined the opportunity to cross-examine, asserting that the court was without jurisdiction" (1965 Mass. Adv. Sh. at 434, 204 N.E. 2d at 904-905, R. 50, 51). Thereafter, on May 6, 1963, another final decree was entered (R. 37) declaring that a valid will compromise agreement had been made, and that it was made with the consent of the decedent's children, and ordering Henry S. Price personally, as well as in his character of executor and trustee, to pay Esther Price a sum of

money. Appeals were duly taken from this decree (R. 39), and, as noted above, the Supreme Judicial Court affirmed the second final decree. Its rescript is printed in the Appendix, p. 10.

The Federal Question in the Courts Below.

The question presented was raised initially after the decision of the Supreme Judicial Court by an application for rehearing and reconsideration (App. p. 19), which, after receiving the consideration of the Court, was denied (App. p. 25).[3]

This was the earliest stage at which the question could have been raised. At the time of the trial, as will be fully documented under the heading "Reasons for Granting the Writ" (*post*, p. 7), the law was abundantly clear that, once a judge sitting in equity enters a final decree in a case, he has (subject to certain exceptions not here relevant) no

[3] Technically, an application for rehearing is not a part of the record in a Massachusetts case. Under the practice established in *Powers* v. *Sturtevant*, 200 Mass. 519, the Court, as such, does not entertain motions for rehearing. However, a party considering himself aggrieved may address a letter to the Chief Justice. The correspondence in the present case (App. p. 25) indicates a practice of referring such letters to the other Justices for their consideration. In some other cases the consequence of such a letter has been modification, or even complete withdrawal, of an opinion of the Court.

Since, as is shown in the text above, the question could not have been raised earlier, and since there is no other way to raise it, and since the application and the Chief Justice's reply speak for themselves, this Court may properly look to this technically extra-record evidence of the federal question having been timely raised. *Saunders* v. *Shaw*, 244 U.S. 317, 320. Massachusetts has no practice equivalent to, for example, New York's amendment of the remittitur.

jurisdiction to proceed further in the case. If his entry of the decree was erroneous, the error is correctible only through appeal (or a bill of review, in the limited instances where the latter remedy is appropriate).

Your petitioners took an appropriate appeal from the final decree of December 19, 1962, which all parties now agree was improperly entered. At that time they had no reason to anticipate a retroactive change of procedure for correction of improper entry of final decrees. Had they acquiesced in the trial judge's assertion of jurisdiction, they might well be found to have waived their appeal from the decree, which, it will be noted, had not been vacated at the time the trial judge conducted the further hearings.

Nor was there reason, when the consolidated appeals from the decree of December 19, 1962, and the decree of May 6, 1963, came on to be heard, to anticipate that the Supreme Judicial Court would ignore a long line of its own precedents on chancery jurisdiction and would subject equity proceedings to the thitherto contrary jurisdictional standards applicable in proceedings at law. This is the significance of the citation of *Savage* v. *Welch,* 246 Mass. 170, in the opinion, 1965 Mass. Adv. Sh. at 434, 204 N.E. 2d at 904 (App. p. 14).

Since your petitioners were taken by surprise by the formulation of a new procedural rule, the retroactive application of which to them had the effect of impairing their constitutionally protected right to a hearing, they acted soon enough when they made their claim of federal right after the existence of the new rule was announced. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673. The fact that the Court declined to consider the issue tendered by the application for rehearing does not oust this Court of jurisdiction to consider it. *Saunders* v. *Shaw,* 244 U.S. 317, 320.

Reasons for Granting the Writ.

1. The decision below does not accord with decisions of this Court to the effect that a state court is not free to make changes in its adjective law and to give the changes retroactive effect so that they operate to deprive a litigant of his constitutional right to a hearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 677-678. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 454-458.

In Massachusetts, prior to the decision of this case, an unbroken line of authority had applied, for over one hundred years, the doctrine that "The well settled rule of chancery practice is, that, after a decree has been enrolled, that is, after it has become matter of record, there can be no rehearing, either on motion or petition. *Clapp* v. *Thaxter,* 7 Gray, 384." *Thompson* v. *Goulding,* 5 Allen (Mass.) 81, 82.

In the *Clapp* case it was indicated that the only relief from an improperly entered final decree was by way of bill of review. Later, probably in consequence of the extension of equity jurisdiction to the Superior Court, it was held that such relief could also be had by appeal. *White* v. *Gove,* 183 Mass. 333, 340, 67 N.E. 359, 362. This core doctrine of equity practice that a final decree may be attacked by appeal or bill of review (where appropriate), *but not by motion,* has been consistently followed. *Kingsley* v. *Fall River,* 280 Mass. 395, 398, 182 N.E. 841, 842. *Prenguber* v. *Agostini,* 289 Mass. 222, 193 N.E. 743. *Doris* v. *State Realty Co. of Boston, Inc.,* 333 Mass. 425, 426, 131 N.E. 2d 185, 186.

As the Court recognized in *Thompson* v. *Goulding, supra,* there are some exceptions to this rule. Relief may be had by motion where a party is defaulted through negligence of his attorney (*Sullivan* v. *Sullivan,* 266 Mass. 228, 229, 165 N.E. 89) or, in the case of a corporation, the negligence

of an officer (*Hyde Park Savings Bank* v. *Davankoskas,* 298 Mass. 421, 423, 11 N.E. 2d 3, 5). Likewise, clerical errors in a decree may be corrected upon motion (*Enterprises, Inc.,* v. *Cardinale,* 331 Mass. 244, 245, 118 N.E. 2d 740, 742).

The instant case does not fall within any of these exceptions. In any event, the Supreme Judicial Court did not put its decision on the ground of an exception to the general rule. In ruling flatly that a trial judge in equity has jurisdiction to proceed further after entry of a final decree, it deprived your petitioners "of all existing remedies for the enforcement of a right" (*Brinkerhoff-Faris, supra,* 281 U.S. at 682) after your petitioners had conducted themselves "in justified reliance upon prior decisions" (*N.A.A.C.P., supra,* 357 U.S. at 457).

2. The case presents an important issue of federalism. The very fact that the issue has come up underscores the danger that state court judges may become so engrossed in performing their undoubted function of defining, whether by statutory construction or by the common-law evolutionary process, rules of local procedure that they may overlook possible impacts of their definitions upon rights protected by the national Constitution. This suggests the desirability of this Court's laying down further guidelines limning the constitutional boundaries of state court power to determine local adjective law.

Furthermore, the voice of the cynic has been heard in the land. It has been asserted that some pronouncements of constitutional doctrine have been tailored to the current tide of "racial egalitarianism."[4] Such assertions may tend

[4] *E.g.,* Kurland, "The Supreme Court, 1963 Term," Foreword, 78 Harv. L. Rev. 143-176, *passim,* and, particularly, 162: "It would be helpful if these and other similar cases could be labeled 'good for use in sit-in cases only.' "

to breed the feeling (although it would hardly be expressed forthrightly in judicial opinions) that constitutional doctrines announced in cases growing out of race relations, such as *N.A.A.C.P.* v. *Alabama, supra,* 357 U.S. 449, are to be diluted when sought to be applied in cases without racial overtones. In this case the Court could clarify the question whether a state court is just as inhibited in ignoring, or retroactively overruling, its earlier decisions (*N.A.A.C.P.* v. *Alabama, supra*) as it is in retroactively changing its construction of a statute (*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra,* 281 U.S. 673) when the consequence of its action is to deprive a party of a constitutionally protected right.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, March 4 1965.

IN THE CASE OF

DAVID H. PRICE & another
vs.
ESTHER PRICE & others.

pending in the Superior Court for the County of Norfolk

ORDERED, that the following entry be made in the docket; viz.,—

Final decree entered May 6, 1963, affirmed with double costs to Esther Price.

By the court,
RICHARD A. McLAUGHLIN, Clerk.

March 4, 1965.

Brief statement of the grounds and reasons of the decision:

See opinion on file.

A true copy,
Attest:
RICHARD A. McLAUGHLIN
Clerk.

Appendix B.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 493 of Acts of 1935

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DAVID H. PRICE & another *vs.* ESTHER PRICE & others.

Norfolk. December 7, 1964. — March 4, 1965.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, KIRK, & REARDON, JJ.

Contract, Compromise respecting decedent's estate, Validity, Consideration. *Executor and Administrator*, Compromise. *Equity Pleading and Practice*, Report of evidence, Findings by judge, Counterclaim, Decree.

Suit in equity heard in the Superior Court by *Forte*, J.

REARDON, J. These are appeals by the plaintiffs[1] and by the defendant Henry S. Price from two decrees, each designated "Final Decree." This controversy was before this court in 1960, at which time an interlocutory decree sustaining the defendant Esther Price's demurrer was reversed. *Price* v. *Price*, 341 Mass. 390. Following the overruling of her demurrer the defendant Esther Price (Esther) filed a substitute answer in which she averred that she had entered into a compromise agreement with the defendant Henry S. Price (Henry), a devisee under, and executor of, the will of Louis N. Price.[2] Esther alleged that, by the terms of the agreement, she was to withdraw her appearance in the Pro-

[1] No brief was filed by the defendant Henry S. Price; his motion that the plaintiffs' brief be adopted as applicable to his appeals was allowed. The appeals of the plaintiffs and Henry have been consolidated.

[2] Esther was the second wife of Louis N. Price. The defendants Henry and Pearl Clayman and the plaintiffs, David H. Price and Rosalie Price, are children of Louis N. Price by his first marriage.

bate Court contesting the will and that Henry, as executor was to pay to her, free of all taxes and for the rest of her life, $100 per week and, in addition, $2,000 every two years towards the purchase of a new car. Esther's substitute answer concluded with a prayer that Henry be ordered, as executor, to pay her the amount due under this agreement.

On October 2, 1962, Esther moved that orders of notice issue for personal service upon the defendants Henry and Pearl Clayman, and "that they be ordered to answer to the pleadings entered against them by the Complainants . . . and by the Defendant, Esther Price." Henry and Pearl having failed to respond to the "suit" wherein Esther sought relief, an interlocutory decree taking the bill for confessed was entered on November 27, 1962. On December 12, 1962, an appearance was entered on behalf of Henry by Daniel G. Rollins, Esq. On December 19, 1962, a final decree was entered ordering Henry to pay Esther the sum of $112,330.

On January 4, 1963, the plaintiffs moved to vacate the final decree, urging that it was entered after a hearing of which they had no notice; that Esther's substitute answer failed to comply with Rule 32 of the Superior Court (1954); that Esther's conduct in pursuing her claim violated an outstanding preliminary injunction;[3] and that the decree was not properly entitled "Final Decree." Henry moved to vacate on similar grounds. The latter motion was allowed on March 25, 1963. In a second final decree, entered on May 6, 1963, the judge revoked the preliminary injunction and ordered Henry to pay Esther as before, plus interest.

1. We consider initially Esther's contention that the transcript of evidence is not part of the record before the court because the evidence was not reported in accordance with G. L. c. 214, § 24, or Rule 76 of the Superior Court (1954). It is settled that where there is nothing outside of a stenographer's recital to indicate that any person was

[3] See *Price* v. *Price*, 341 Mass. 390, 392.

designated to take the testimony and where no record indicates any action of the judge or notation by the clerk with reference to any appointment, a transcript cannot be considered part of the record. *Thayer Co.* v. *Binnall,* 326 Mass. 467, 482. An examination of the docket (see *Styrnbrough* v. *Cambridge Sav. Bank,* 299 Mass. 22) indicates no order by the trial judge that the transcript be included in the record. *Teal* v. *Jagielo,* 327 Mass. 156, 157. *Delorafano* v. *Delorafano,* 333 Mass. 684, 685. We thus have not considered the evidence.

The case is before us on the judge's report of material facts which must be taken as true "except to the extent that they are inferences from subsidiary findings or are inconsistent with each other or with the pleadings." *Sturnick* v. *Watson,* 336 Mass. 139, 143. See *Tompkins* v. *Sullivan,* 309 Mass. 496, 497.

2. The judge ruled that the portion of Esther's substitute answer containing the allegations and prayer for affirmative relief, although not designated "counterclaim," complied with the requirement of Rule 32 of the Superior Court (1954) that a counterclaim "shall be . . . described clearly as by way of counterclaim." If there was a defect of pleading, it could be met only by demurrer or motion to strike. *Mitchell* v. *Carrell,* 321 Mass. 453, 454–455. Neither pleading was filed. In fact, no answers to Esther's counterclaim were filed by any party.

3. It is contended that the decree of December 19, 1962, is void for want of notice to the plaintiffs or to Henry of the hearing upon which the decree was based and at which an actuary testified to the present value to Esther of the compromise agreement. In his allowance of Henry's motion to vacate this decree the judge noted that Henry had received no notice. The final decree was entered upon a decree pro confesso which, had adequate notice been given, would have been a proper disposition of the counterclaim. Rule 26 of the Superior Court (1954). *Medlinsky* v. *Premium Cut Beef Co.* 317 Mass. 25, 34. Allowance of Henry's motion protected his right to be heard at all stages of the

proceedings. See *Hyde Park Sav. Bank* v. *Davankoskas*, 298 Mass. 421, 423–424, and cases cited.

The plaintiffs argue that while the final decree of December 19, 1962, on its face disposed only of a counterclaim, its effect was to render impossible the relief which they seek in this suit since any later decree in the plaintiffs' favor would be repugnant to the disposition of the counterclaim. The plaintiffs' contention is that they were indispensable parties to the proceedings, that therefore they can appeal from the decree, that the decree must be set aside for want of notice and that the plaintiffs having never withdrawn their appeal of January 2, 1963, the court was without jurisdiction to enter a further final decree on May 6, 1963. While this argument exhibits technical virtuosity, it ignores the fact that the court in granting Henry's motion to vacate the decree of December 19, 1962, vacated it for all parties. Cf. *Sullivan* v. *Sullivan*, 266 Mass. 228, 229; *Enterprises, Inc.* v. *Cardinale*, 331 Mass. 244, 246. We are satisfied that the rights of the plaintiffs were adequately protected since at the hearing of January 16, 1963, upon which the decree of May 6 was based, all witnesses who had testified previously were available for cross-examination. Counsel steadfastly declined the opportunity to cross-examine, asserting that the court was without jurisdiction. The court ruled that it did have jurisdiction. We sustain that ruling. See *Savage* v. *Welch*, 246 Mass. 170, 178.

4. When this case was before this court on the demurrer, the plaintiffs asserted in their brief that the compromise agreement was entered into "without the consent of the beneficiaries." Our earlier holding was that while Henry's discretion as executor was very broad it could not properly be exercised "dishonestly, arbitrarily, in bad faith, or as the result of fraud." *Price* v. *Price*, 341 Mass. 390, 392–393. The trial judge has found that Henry did not exercise his power to compromise in violation of the standards laid down.

The plaintiffs present several arguments of law, contending that the oral rescission of the antenuptial agreement

by Louis N. Price and Esther, in the presence of a trustee, was void or, alternatively, that they are entitled to rescission of the compromise agreement. Resolution of these arguments, if necessary to the disposition of the case, would present questions of complexity. But the trial judge has found that the compromise agreement "was authorized and approved with full knowledge of its terms and provisions by the other parties . . . namely the plaintiffs David . . . and Rosalie . . . and the other defendant, Pearl Clayman." The judge found that Esther received $2,000 from Henry on September 4, 1957, and a weekly check for $100 beginning November 1, 1957. The payments were discontinued after December 26, 1958.[4] The judge's report states further that after the payments stopped and Esther had instituted an action at law to enforce the compromise agreement "a conference was had at the office of the counsel for the petitioners at which Henry Price, Pearl Clayman, David Price and Rosalie Price were present and participated; and as a result of said conference this bill in equity was prepared and signed, and acceptance of service on the two respondents Henry and Pearl was signed by them respectively at the bottom of the petition itself before the petition was entered in Court."

The findings of the judge that Esther acted "in good faith, in the honest belief that she had all the rights of a widow" and that Henry entered into the compromise agreement with the full knowledge and consent of his brother and sisters establish, without further inquiry into the many issues raised by plaintiffs' counsel, Esther's rights under the agreement. While forbearance to pursue a claim known to be frivolous would not constitute good consideration, it need not appear, in retrospect, that there was a valid cause

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[4] On June 9, 1958, Henry's attorney, Mr. Rollins, drew up a petition for settlement, incorporating the terms of the compromise. This petition was never formally executed or filed in court. Although statutes dealing with compromises by executors have been enacted (G. L. c. 204, §§ 13–18), the executor retains his common law right to compromise claims. *Chadbourn* v. *Chadbourn*, 9 Allen, 173. *Wallin* v. *Smolensky*, 303 Mass. 39, 41. *MacDonald* v. *Gough*, 327 Mass. 739, 742.

of action or even that the asserted ground was reasonable. *Blount* v. *Wheeler*, 199 Mass. 330, 336. *Mackin* v. *Dwyer*, 205 Mass. 472, 475. *Codman* v. *Dumaine*, 249 Mass. 451, 457–458. *Sherman* v. *Werby*, 280 Mass. 157, 160. *Higgins* v. *Gilchrist Co.* 301 Mass. 386, 390. At the time of the compromise Henry was fully apprised of all facts and, with the approval of David, Rosalie and Pearl, decided not to litigate the widow's claim. That he may have labored under a mistaken view of the parties' respective rights can be of no avail. *Mackin* v. *Dwyer, supra,* at 476. *Silver* v. *Graves,* 210 Mass. 26, 29–30.

Final decree entered May 6, 1963, affirmed with double costs to Esther Price.

Joseph G. Crane (*George Broomfield* with him) for the plaintiffs.

John H. Fletcher Calver (*Joseph Schneider & Robert L. Schneider* with him) for the defendant Esther Price.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
No. 66757

DAVID H. PRICE ET AL
vs.
ESTHER PRICE ET AL

FINAL DECREE AFTER RESCRIPT FROM THE SUPREME JUDICIAL COURT

This cause came on to be further heard upon the matter of the entry of a final decree after rescript from the Supreme Judicial Court, and thereupon, in conformity to said rescript, it is ordered, adjudged and decreed as follows:

1. The antenuptial agreement duly executed on or about July 22, 1940 between Louis N. Price and the defendant Esther Price, a copy of which is annexed to the Bill of Complaint marked A was annulled and cancelled, in April of 1957, by the parties through a trustee, William Winer, and each of the parties to the said agreement was discharged from all obligations thereunder.

2. The preliminary injunction issued under Prayer 1 of the Bill of Complaint is hereby revoked.

3. A valid agreement of compromise was entered into between Esther Price and Henry S. Price by the terms of which said Esther Price withdrew her appearance contesting the allowance of the will of the late Louis N. Price and waived all rights of a widow in said estate, and the said Henry Price for himself, as executor named in the said will as executor of the said will, and as trustee of the trust created in said will promised and agreed to pay to the said Esther Price the sum of $2,000.00 at the time the agreement was entered into and the further sum of $2,000.00

every two years thereafter, all tax free, during the life of the said Esther Price and the further sum of $100.00 each and every week thereafter to the said Esther Price, all tax free, during the rest of her natural life.

4. In entering said agreement of compromise the said Henry Price acted in good faith, with the full knowledge and consent of the complainants and the respondents and the respondent Pearl Clayman; that the said Henry Price in entering said agreement of compromise was duly empowered and authorized so to do under the terms of the will of the said Louis N. Price; that he did not exercise such power to compromise dishonestly, arbitrarily, in bad faith, nor as the result of fraud.

See Price v. Price, 341 Mass. 390, 392-393.

5. Under the counterclaim of Esther Price against the respondent Henry S. Price the said Henry S. Price personally, as executor of the will of Louis N. Price and as trustee under the said will, pay to the respondent Esther Price the sum of $112,330.00 with interest from December 19, 1962, in the sum of fifteen thousand fifty two dollars and 22/100.

6. That the petitioners and respondent Henry S. Price pay double costs in the sum of Fifty-Five Dollars ($55.00) to Esther Price.

(Murray, J.)
Att. George N Hurd, Jr.
Assistant Clerk

Entered: March 15, 1965

March 15, 1965 Ordered: The clerk may insert in paragraph numbered 6 herein, as designating costs, the words

and figures "fifty-five dollars ($55.00), and, thereupon, the within decree may be entered.

FRANK J. MURRAY
J.S.C.

A True Copy:
Attest: GEORGE N HURD, JR.
Asst Clerk

A True Copy:
Attest: JOSEPH P. SCHANK
Constable of Boston

Appendix D.

[Letterhead of Crane, Inker, Zamparelli & Oteri.]

Honorable R. S. Wilkins
Chief Justice
Supreme Judicial Court
Boston, Massachusetts

RE: Price v Price
S. J. C. Docket number 6514

Dear Mr. Chief Justice:

Pursuant to the practice prescribed in Powers v Sturtevant, 200 Mass. 519, we address you with respect to the opinion filed in the above case. The purpose of this communication is to obtain a re-hearing or re-consideration of the above case for reasons hereinafter set forth.

Central to the plaintiffs' argument in the appeals of this case is the proposition that the trial court had no jurisdiction to revoke or modify the final decree of December 19, 1962, and that, consequently, the second final decree, entered on May 6, 1963 was a nullity. (plaintiffs' brief, pp. 6, 7, 8).

It has been the settled law of the Commonwealth for many years that a judge sitting in equity, once he has entered a final decree in a case, has no power to rehear or vacate. Any errors are correctible only by appeal, or where appropriate, bill of review. Thompson v Goulding, 5 Allen 81, 82; White v Gove, 183 Mass. 333, 340, and text and cases cited in Reed, Equity Pleading and Practice §§ 1051-1053.

The decision of the Supreme Judicial Court, by recognizing a jurisdiction in the trial judge to vacate his original final decree and to conduct further proceedings culminating in another final decree in modification of the first, is incompatible with the earlier established doctrine. In effect, it tells the plaintiffs that they should have engaged in proceedings which, until now, the trial court had no jurisdiction to conduct. If this retroactive overruling of the earlier doctrine as to jurisdiction to vacate or modify a final decree stands, the plaintiffs will have effectively been deprived of their opportunity to be heard. This would be in violation of their rights under the due process clause of the Fourteenth Amendment of the United States Constitution. Brinkerhoff-Faris Co. v Hill, 281 U. S. 678; NAACP v Alabama, 357 U. S. 449, 457-458.

The cases cited in the Court's opinion [Appendix A, p. 14, *supra*] do not support the conclusion that the trial court had jurisdiction to do what it did.

In Savage v Welsh, 246 Mass. 170, 178 there are the following elements of differentiation from the instant case: (1) What was involved was jurisdiction to amend a declaration, not jurisdiction to vacate a judgment; (2) The amendment was in affirmation of the judgment which had been rendered (G. L., c. 231, § 56), not in derogation thereof. (Higgins v First National Stores, 340 Mass. 618); (3) The amendment was as to a matter of form (viz., setting forth in two counts what had originally been stated in one), not,

as in the instant case, as to matters of substance (viz., vacating and modifying the decree itself); (4) The proceeding was an action at law, subject to G. L., c. 231, § 56, not a suit in equity which is subject to traditional rules of chancery jurisdiction which have not been changed by statute in any relevant respect.

In Sullivan v Sullivan, 266 Mass. 228, 229, the Court applied the exception (Thompson v Goulding, 5 Allen 81, 82) to the rule that a judge is without jurisdiction to vacate a final decree, viz., where the decree was obtained by default through the negligence of the defaulted party's solicitor. This exception is not relevant to the instant case. In vacating the first final decree in the case the judge recited (R., 37): "No notice of hearing on a final decree was given to Henry Price or his counsel of record."

Enterprises, Inc. v Cordiale, 331 Mass. 244, 246 supports the position of the plaintiffs. It points out that after entry of a final decree no change can be made, save for correction of clerical errors. Here, as there, the revocation of a final decree should be held to be more than correction of a clerical error.

It is submitted that the disposition of the appeals should have been: reversal of the decree of December 19, 1962 for want of notice of hearing on that decree, and reversal of the decree of May 6, 1963 for want of jurisdiction to enter that decree. It is respectfully requested that the Court, either on its own motion or after reargument, reconsider its decision on the jurisdictional point. In the alternative, it is requested that, to the extent that the decision overrules earlier doctrine, the overruling be prospective and applicable only to cases arising in the future (Great Northern Railway v Sunburst Oil Co., 287 U. S. 358). This would call for the same disposition of the appeals as that indicated above.

The Merits

In appraising the opinion of the court we have concluded that the critical passages are in the section of the opinion numbered 4 and which read as follows:

> "But the trial judge has found that the compromise agreement 'was authorized and approved with full knowledge of its terms and provisions by the other parties . . . namely the plaintiffs David . . . and Rosalie . . . and the other defendant, Pearl Clayman."
>
> "The findings of the judge that Esther acted 'in good faith, in the honest belief that she had all of the rights of a widow' and that Henry entered into the compromise agreement with the full knowledge and consent of his brother and sisters establish, without further inquiry into the many issues raised by plaintiffs' counsel, Esther's rights under this agreement."

We are of the opinion that the foregoing findings based on the report of Material Facts were the determining factor which led the court, not only to the result reached, but to the decision not to consider the evidence because obviously if these findings be sound, any agreement of compromise which Henry Price may have entered with Esther Price with the authority and knowledge of his sisters and brother, would have been binding on the plaintiffs and on Mrs. Clayman and Henry Price. It must be apparent that if these were the facts, counsel would never have undertaken this litigation. It is respectfully suggested that the sheer incredibility of the situation should have led the court to examine the testimony.

Examination of the testimony will disclose that both Rosalie Price and David Price testified clearly that they had no knowledge of the existence or terms of any agreement between Henry Price and Esther Price. Further-

more, the testimony of Henry Price was clear that he had never entered into an agreement with Esther Price.

On our view of the case, that the court had no jurisdiction to conduct the hearing in Cambridge, the testimony of Mrs. Clayman and Mrs. Esther Price should not be considered. At best the testimony of Mrs. Price is vague and the result of gross leading of the witness. In any event Mrs. Price in no way testified that Rosalie Price or David Price knew of any agreement between Mrs. Price and Henry Price.

As to the testimony of Mr. Weiner the court limited its effect to the credibility of Henry Price's testimony. (Tr 7 of second day of Dedham hearing.)

Weiner however did testify that he talked with each plaintiff and had informed each of the terms of the alleged agreement. This testimony is in direct conflict with that of Rosalie, David and Henry and is unsupported by that of Mrs. Price and Mrs. Clayman.

Accordingly the findings of the trial court quoted in the opinion of the court and set forth at the beginning of this letter are at odds with the great preponderance of the evidence.

An examination of the testimony will reveal that the question of the designation of a stenographer was raised more than once. Especially at the hearing in Cambridge is this true. (Tr. 71-72) On that occasion the trial judge ruled that it was a matter of discretion with him whether or not to appoint a stenographer under G. L. (Ter. Ed.) c. 214, Section 24 as amended by St. 1947, c. 365, Section 1.

The docket discloses that a formal request in writing had been made which could have been acted upon.

It seems clear that the 1947 amendment was intended to abolish the requirement that the request be made "before any evidence is offered." That phrase was eliminated by St. 1947, c. 365, section 1, so that the relevant language of G. L. (Ter. Ed.) c. 214, section 24 reads as follows:

"Upon an appeal, the testimony of witnesses who have been examined orally before a justice of either court shall, at the request of any party, be reported to the full court."

It would seem apparent that the legislature by employing the term "shall" intended to make this provision mandatory and not a matter of the Trial Judges' discretion.

There is a further difficulty. There are in the record two "Final Decrees." pp. 31, 38. They are not consistent. The earlier decree of December 19, 1965, (R. 31) ran against the respondent Henry S. Price as executor and trustee. The later decree of May 6, 1963, (R. 39) also ran against Henry S. Price personally. The rescript purported to affirm the decree of May 6, 1963.

The decree must conform to the frame of the bill. Affirmative relief granted to a respondent on a counterclaim must be consistent with and within the scope of the counterclaim.

Medlinsky v Premium Cut Beef Co., 317 Mass. 25, 33.

In the instant case the counterclaim ran only against Henry S. Price as the executor of the will of Louis N. Price. (R. 23-24) Consequently the decree of May 6, 1963 against Henry S. Price was beyond the scope of the counterclaim.

In view of the foregoing considerations we most respectfully move that the court reconsider the case in the light of the evidence in order to avoid what we feel to be a miscarriage of justice and a reflection upon counsel without due consideration of the evidence.

Respectfully submitted,
JOSEPH G. CRANE
MONROE L. INKER
JOHN D. O'REILLY, JR.

JGC:mmf

Appendix E.

[Letterhead of Supreme Judicial Court.]

March 18, 1965

Joseph G. Crane, Esquire
Monroe L. Inker, Esquire
John D. O'Reilly, Jr., Esquire
41 Tremont Street
Boston, Massachusetts 02108

Dear Sirs:

Your request for rehearing in case No. 6514, *Price* v. *Price,* has been received and will be considered by the full court.

Yours truly,
Raymond S. Wilkins
Chief Justice

cc: John H. Fletcher Calver, Esquire

Appendix F.

[Letterhead of Supreme Judicial Court.]

April 1, 1965

Joseph G. Crane, Esquire
Monroe L. Inker, Esquire
John D. O'Reilly, Jr., Esquire
41 Tremont Street
Boston, Massachusetts 02108

Dear Sirs:

Your request for rehearing in case No. 6514, *Price* v. *Price,* has been considered by the full court and is denied.

Yours truly,
R. S. Wilkins
Chief Justice

cc: John H. Fletcher Calver, Esquire